OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY, AND ROY LAWRENCE BOURGEOIS, Petitioners v. UNITED STATES

CASE NO: 92-6921

PLACE: Washington, D.C.

DATE: Wednesday, November 3, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN PATRICK LITEKY, CHARLES :
JOSEPH LITEKY, AND ROY :
LAWRENCE BOURGEOIS :
Petitioners :
v. : No. 92-6921
UNITED STATES :

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Washington, D.C.

Wednesday, November 3, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:57 a.m.

APPEARANCES:

PETER J. THOMPSON, ESQ., Minneapolis, Minnesota; on behalf of the Petitioners.

THOMAS G. HUNGAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:57 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 92-6921, John Patrick Liteky v. United States. Mr. Thompson.

ORAL ARGUMENT OF PETER J. THOMPSON

ON BEHALF OF THE PETITIONERS

MR. THOMPSON: Mr. Chief Justice and may it please the Court:

This case comes before the Court on a writ of certiorari from the Eleventh Circuit Court of Appeals. There, the Eleventh Circuit held that recusal motions of Federal judges under 28 United States Code section 455(a) have to be considered with the extrajudicial source requirement and therefore the arguments concerning a judge's conduct in the courtroom were improper and they did not need to be considered in terms of such a motion, and therefore affirmed the conviction of my three clients.

In 1983, by way of background as to these convictions and to this motion to recuse, Father Bourgeois, Father Rosebaugh, and Ms. Ventimiglia were arrested and convicted in Georgia of various petty misdemeanors before the Honorable J. Robert Elliott in the Middle District of Georgia.

QUESTION: If they were petty misdemeanors, how

did they get into Federal court? Was it a Federal enclave type of thing?

MR. THOMPSON: It was. It was a Federal reservation on the Fort Benning base.

So because they were petty misdemeanors, Chief Justice, it was a bench trial. That bench trial obviously generated a transcript. There were sentences. There was no appeal from that case.

In 1991, Father Bourgeois, Charles Liteky and Pat Liteky were charged again with regard to activities on the Fort Benning military base, this time with a felony, and as a result of that indictment were brought before Judge Elliott, the same judge who had presided at the 1983 case, and filed a motion to recuse Judge Elliott based largely, in fact almost exclusively, on his conduct in the 1983 case and attached as part of that motion not only argument but a transcript of the 1983 proceeding.

Judge Elliott denied the motion, rejected the motion, citing the leading Fifth Circuit and Eleventh Circuit cases which have an extrajudicial source requirement for 455 Federal recusal motions and indicated because the events that were alleged requiring the recusal arose in the courtroom, that is, part of the judicial proceedings, that judicial conduct need not be considered under 455(a).

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The Eleventh Circuit, as I held -- as I indicated affirmed that. After the recusal motion was denied, there was another trial in 1991, this time with a jury. It was a day-and-a-half trial, and that resulted in convictions and sentences of the defendant.

QUESTION: Mr. Thompson, was there an appeal in the -- in the 1983 case, was there any appeal?

MR. THOMPSON: There was not in the 1983 case, Your Honor.

QUESTION: Isn't there some concern here that the recusal motion is being used to substitute for, to do service for an appeal objecting to the fairness of the trial in 1983?

MR. THOMPSON: Justice Ginsburg, there is not a concern that I've seen raised by the Government in this case concerning that. There was --

QUESTION: Well, in allowing a litigant to rely on conduct in a prior trial when that judgment wasn't appealed, allow that many years later to come up in the guise of a recusal motion, is -- perhaps that's the reason why courts have said they're not going to entertain what might be regarded as a substitute for an appeal in this form.

MR. THOMPSON: Your Honor, I don't think that would be a substitute for the appeal because it would be

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governed by substantially different standards.

That is, if there had been a direct appeal to the Eleventh Circuit in 1983 on fair trail grounds, it would be judged by abuse of discretion, whereas that appeal conceivably and academically could be lost, and it could still arise under 455(a) to a possibility or a reasonable doubt as to partiality under that statute and require recusal, even though there had been an affirmance in 1983, so I don't think those are exact comparable issues.

The face of --

QUESTION: Now, the challenge here was brought under 455(a), is that correct, not under any of the provisions of 455(b)?

MR. THOMPSON: That's correct, Your Honor. That's -- the petition for this writ of certiorari is limited to 455(a).

QUESTION: And would you think that the facts here as you allege them to be would also be sufficient to amount to something that could be challenged under 455(b)(1), which is the personal bias or prejudice concerning a party?

MR. THOMPSON: I do not, Your Honor, because personal bias or prejudice since United States v. Grinnell in 1966 means extrajudicial conduct, and I think that --

QUESTION: And you accept that --

MR. THOMPSON: I accept that.

QUESTION: -- requirement under (b)(1)?

MR. THOMPSON: I accept that.

QUESTION: So you're trying to fit this under the whether the impartiality might reasonably be questioned standard.

MR. THOMPSON: Exactly.

QUESTION: Thank you.

MR. THOMPSON: And I think the face of the statute supports exactly that distinction, and that is really, I think, what clearly is to be decided here.

The statute reads, "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." It doesn't say personal, as 455(b) says. It doesn't say personal, as to 144 says. Personal has been held to be the extrajudicial source requirement. This statute, plainly on its face and for many good policy reasons that are enunciated by this Court in Liljeberg and by Congress to apply to any conduct of the judge.

In other words, the source of the bias, whether it be through judicial conduct or through extrajudicial conduct, is totally irrelevant. What is important for the

court system and the integrity of the judiciary that if there is bias, it need be considered.

QUESTION: Well, what -- now, let's find out what kind of bias we're talking about. Supposing that you're in a many-judge trial court and, as is common, some of those judges have a reputation for being proplaintiff in personal injury cases, and some have a reputation for being prodefendant. Is that the sort of bias that could be attacked by this section?

MR. THOMPSON: Mr. Chief Justice, it is not, in my view. In other words, those sort of judicial proclivities or philosophies are not bias. What bias is is not the manner of ruling in a particular case or the judgments in a case. It is the conduct that a judge engages in which indicates a kind of inclination or favoritism or hostility, or some of those kinds of things, against or for a party which would render a reasonable person to question impartiality.

QUESTION: And not a disfavor or dislike of a particular kind of lawsuit.

MR. THOMPSON: Not at all. In fact --

QUESTION: There is some overlap between the fairness of the trial, because the things that you -- if you have a biased judge, certainly you don't have a fair trial, and so you are asking this judge to go over making

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this decision, the record of an old trial, in somewhat of the manner that a court of appeals would review it to determine if the trial had been fair.

It may -- I agree with you that they're not identical, but there is a considerable overlap. What -- you're asking this trial judge to kind of sit in judgment on his own performance, some similarity to what a court of appeals would have done if you had appealed the original conviction and said I didn't get a fair trial.

MR. THOMPSON: Justice Ginsburg, I think there is substantial similarity. The judge would be looking at the same sort of facts. The judge would have the transcript in front of him or her. The differences would be that the judge would not only be looking at the transcript with a view toward whether or not they are biased, or lack impartiality. That is, they couldn't sit in the next case.

The judge under this standard, and this is what the Congress has said should be done, should look at it from the observation of a reasonable person. Not from their own standard, viewpoint, as a reasonable person, whether that reasonable person would then harbor a doubt as to their impartiality, and so it makes sense in a way, although difficult for a judge to do it him or herself, because by looking at it, the judge may think that the

actions were justifiable but may reflect and may have their recollections so refreshed that they would think perhaps if a reasonable person was sitting it might look as if I shouldn't then sit in this next case.

QUESTION: It would have to be the appearance, because a judge takes an oath to administer justice without respect to persons. If a judge couldn't do that, the judge would be duty-bound to recuse, so what you're suggesting is, although the judge knows he isn't biased, that he's supposed to read an old transcript to determine whether somebody, some reasonable viewer might think she was.

MR. THOMPSON: Exactly, and that's exactly why 455(a) was passed, because at the time it was passed, it was passed to conform with the Code of Judicial Conduct which had just been passed by the American Bar Association, which incorporated for the first time in these statutes an appearance of impropriety standard rather than actual bias.

QUESTION: Is there -- let me ask you another question about the kind of bias we're talking about. Is it limited to the situation where the claim is made that a judge would disfavor the litigant in making the affidavit in a way that he would not disfavor another litigant who had exactly the same sort of legal claim?

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MR. THOMPSON: Mr. Chief Justice, I don't know if -- under 455(a) the affidavit is not required. That's required under 144. I think whether or not the person actually makes the recusal motion would go beyond where we are asserting the Court should really draw the line. In other words, the process itself of filing the motion to recuse for a practicing lawyer certainly would be something not done lightly and be done with great consideration, but what I am saying is that proceedings that occurred before then in court which were judicial in nature should be considered by the judge in passing on the motion.

QUESTION: Well, what I'm -- I think what I'm trying to get at is something a little different. Supposing that you could show that Judge Elliott treated your clients in your view hostilely, and that a reasonable person would think it was, but that it was also -- it could also be shown that he treated virtually all people who were arrested for protesting at Fort Benning, if there were a number of them, the same way. Now, would that be sufficient?

MR. THOMPSON: I'm not sure if that would be sufficient. It would certainly be probative, and if a pattern of conduct could be established that in every case where someone who was in the same position of the

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defendant in those situations, it would be probative as to bias, but --

QUESTION: Well then, where do you draw the line between that and someone who is not at all friendly to plaintiffs' personal injury suits but treats all plaintiffs, personal injury plaintiffs, with equal "hostility"?

MR. THOMPSON: Where you draw the lines, Your Honor, I think is very difficult.

QUESTION: Certainly the way you're going at it I think it is.

MR. THOMPSON: I think -- you know, Congress, by passing this statute, a broad statute like this, basically indicated that it may be very difficult to make these determinations. I don't --

QUESTION: Whether it's difficult in a particular case for a judge to make it, I certainly agree with you, but don't we have to have some uniform definition of bias before we can get at the reasonableness and so forth, which may be very difficult?

MR. THOMPSON: I was reviewing on Sunday afternoon some of the cases and articles, and I wrote out, although I wasn't asked to and it wasn't part of the tasks for the briefs, because I thought this might come up, a definition of bias as I think it would fit into the

standards that were applicable in 455(a), and what I came up with was this: circumstances that would lead a reasonable person to question whether the judge's inclination or state of mind toward a party belies favor or aversion of a degree or kind that might affect the judge's impartiality in the case.

I think a more exacting definition of bias or of the standard, or to anticipate all the different ways in which it could come up, such as the Court's hypothetical about protestors at Fort Benning, would be almost impossible, and it needs to, of course, be handled on a case-by-case basis.

QUESTION: The problem -- your response to the Chief Justice disclosed this. The problem -- what you're proposing is, it doesn't just open up every prior trial that a particular defendant has had before this judge. It opens up any prior trial that involved the same kind of issues.

I mean, defense counsel could bring in other trials involving protestors at Fort Benning, or other trials involving personal injury plaintiffs, or whatever. It really gives enormous scope to disqualification motions, and in criminal cases, especially where there's not much to lose, I worry about the amount of time that judges are going to have to be spending in considering

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these motions.

It's not just that this particular defendant was tried earlier, it's that this judge has shown that he doesn't like child molesters, or he doesn't like whatever. Isn't there any way to avoid subjecting the judiciary to that enormous burden?

QUESTION: Justice Scalia, I don't suggest that there be minitrials in every case. I don't suggest that the hypothetical posed by the Chief Justice be grounds under 455(a).

One response I could make is that the Government in this case said virtually in every case what this is going to cause, open the Pandora's Box and there will be 455(a) motions ad nauseam, and there will be writs of mandamus, and in the one circuit that has clearly rejected the extrajudicial source requirement, the First Circuit, that was done in early 1990.

We cited in our reply brief a Lexis search and there were -- if you looked at mandamuses and 455(a) cases for the last 2-1/2 years in the First Circuit, there have been zero, so I don't know if that's a partial answer to the question, but it doesn't appear that the deluge or the problem is one that's going to occur.

The other answer to the question is, the court's very --

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QUESTION: If you're representing a defendant who has been before a stern judge before, a judge that you think you might have a case for saying there was an appearance of bias, wouldn't you be bound, as a defense attorney, to make that recusal motion?

MR. THOMPSON: I don't think so, Your Honor. I've been a criminal defense lawyer for 25 years, and I've never brought a recusal motion before, and I've been before many stern judges.

A filing of a recusal motion in Federal court would be, in most instances, I think -- because of some of the dynamics that the Chief Justice has indicated would not be a good idea, because for the very interests of the client, particularly if there weren't very good grounds, because then your client is going to be before that judge, having had your recusal motion denied, for sentencing at a later time. You'd lose the case. So I think there are some definite prophylactic things that are built into the standard.

The other answer to Justice Scalia's question is, really, in the system right now, we have the same thing happening, only it's not under 455(a) where it should be. We have it done under inherent authority of the Federal courts. In other words, every court of appeal removes judges in cases under their inherent authority for

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their conduct in the courtroom, whether or not they have adopted extrajudicial source requirement or not.

QUESTION: Why shouldn't it be - haven't you made a point that doesn't work in your favor? Why shouldn't the authority be at that level, rather than asking trial judges to sit in judgment on themselves and review old transcripts, the kind of authority that you're talking about generally would occur on an appeal, where there's a remand with instructions to have the case retried before another judge? So I suppose contemporaneous, not 10 years later, and it's by a reviewing authority rather than the judge in the first instance herself.

MR. THOMPSON: For two reasons, Your Honor. Number 1, in many courts of appeal, what they are using is a much stricter standard than this statute requires. That is a pervasive bias standard, and for the courts to maintain their appearance of impartiality, this more liberal standard should be applied, and number 2, because this is exactly the scheme that Congress set up. It set it up to do it on this standard, and it set it up to do it under the appearance of impropriety and it set it up so the sitting judge would do it in the first instance.

If there aren't any other questions at this time, I'd like to reserve.

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QUESTION: I have one question. There's some discussion in the briefs about the actual alleged misconduct of the judge in this case. What, in your view, is the most serious transgression that the trial judge made here indicating a lack of impartiality?

MR. THOMPSON: You mean in the 1983 or the 1991 trial?

QUESTION: Well, you take your pick. The reason I'm asking the question is, I think perhaps if we reached the merits we would not be as offended by the trial judge's conduct as you suggest in you briefs, and I just want to be sure I've focused on what you think the most egregious misconduct of the judge was.

MR. THOMPSON: The only misconduct that is specifically alleged on this petition is the failure to look at the whole transcript, so we're clear on that. I'm not accusing a judge of a particular factual matter, but the factual matters as are set out in 1983, I have summarized ten different events which I think, looked at in the total context of that trial, would raise an appearance of bias.

QUESTION: And my question is, which of the ten do you think is the worst?

MR. THOMPSON: In -- one of the ten in 1983, and I would say when Judge Elliott -- Father Rosebaugh got up

to give a closing argument, and Judge Elliott, who was the finder of fact in that case because it was a bench trial, so severely criticized Father Rosebaugh for giving a statement when he hadn't testified at trial that Father Rosebaugh was obviously intimidated and stopped and abandoned his argument, and then --

QUESTION: We might have done the same thing here, if you had given a similar statement. You know better than to do that. It seems to me that that was necessary in order to focus the defendant's attention on what was going to be determinative of guilt or innocence.

MR. THOMPSON: It's --

QUESTION: It may be there's a polite and an impolite way to do this, I suppose.

MR. THOMPSON: And I knew that as soon as I gave one out of the ten in '83, or one out of the ten in '91, I could be met with that rejoinder. That is, it may be perfectly appropriate in any of those given situations. That's why I think if you look at the totality of the conduct and the post-'91 trial conduct, it's apparent at this point that there is a reasonable ground of bias.

QUESTION: You rely on the principle of synergism.

MR. THOMPSON: In part, Your Honor. Thank you.

QUESTION: Thank you, Mr. Thompson. Mr. Hungar,

we'll hear from you.

ORAL ARGUMENT OF THOMAS G. HUNGAR

ON BEHALF OF THE RESPONDENT

MR. HUNGAR: Thank you, Mr. Chief Justice, and may it please the Court:

The question presented in this case is whether 28 U.S.C. section 455(a) was intended to overturn the fundamental principle of recusal law that a judge's unfavorable attitudes towards a party are generally not disqualifying unless they have an extrajudicial source.

QUESTION: Mr. Hungar, you just said, generally. That's not what the Eleventh Circuit said.

MR. HUNGAR: Well, the Eleventh Circuit and every other court of appeals to address the question, Justice Ginsburg, has recognized a pervasive bias exception to the extrajudicial source requirement. The Eleventh Circuit did that in the McWhorter case, which is cited in our brief, and we cite a number of other decisions for that proposition as well.

QUESTION: You read the sentence in the opinion we're reviewing, "but matters arising out of the course of judicial proceedings are not a proper basis for recusal," as implicitly to contain the qualification, "except in extraordinary cases."

MR. HUNGAR: Well, what the Eleventh Circuit did

there, Your Honor, is state the general rule. It didn't refer to the pervasive bias exception, which clearly exists under Eleventh Circuit law and under the law of the other circuits, because petitioners never claimed -- never relied on that argument.

All petitioner -- the only issue presented to the Eleventh Circuit was this extrajudicial source requirement argument that the extrajudicial source requirement does not exist with respect to claims made under section 455(a).

The Eleventh Circuit implicitly rejected that argument, and since there was no other argument being made by petitioners with respect to the recusal motion, did not address the pervasive bias issue, and of course, for the same reason that issue is not before this Court.

The only question presented by petitioners is whether the extrajudicial source requirement applies under section 455(a), but we certainly believe, and the courts of appeals have indicated, that there is a pervasive bias exception to handle the egregious cases where a reasonable person would believe, based on the judge's actions arising solely out of judicial proceedings, that the judge is pervasively biased against a party and therefore should not --

QUESTION: I take it the answer to my question

is yes, you do not read this as an ironclad rule without any exception?

MR. HUNGAR: Correct. Correct. The Eleventh Circuit stated the general rule. It didn't refer to the exceptions, because the exception had not been raised in this case, but the Eleventh Circuit has not applied the extrajudicial source requirement as an ironclad rule, nor has any other court that we're aware of, and we don't believe that it is an ironclad rule.

What the extrajudicial source requirement reflects is the common sense notion that as a general matter it's not reasonable to infer disqualifying bias from the fact that a judge has formed opinions about the parties or the merits of the case based on what the judge has learned in the course of presiding over a case.

QUESTION: And, of course, we could construe subsection (a) entirely consistently with what you have just said --

MR. HUNGAR: That's exactly right.

QUESTION: -- and still come out your way, I take it.

MR. HUNGAR: That's correct, Justice Souter. We believe that the language of section 455(a), which refers explicitly to a reasonableness requirement, a rule of reason is certainly not inconsistent with the

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extrajudicial source doctrine as it has developed over the years, because that doctrine, as we indicate, has a pervasive bias exception, but it is simply in keeping with the normal perceptions of a reasonable, fully informed observer, that as a general matter, when a judge makes credibility findings or rules on the merits, or acts in any number of ways that may be perceived as unfair by a party, as long as the judge is doing that based on what the judge views to be the facts and the law as set forth in the case, that's not a proper basis for recusal.

QUESTION: Well --

QUESTION: Supposing that a judge -- take in this 1983 trial, Judge Elliott had made rulings that were beyond challenge at all, and -- but commented when the defendant finally was led off to where -- you know, I think you're a worthless, mealy-mouthed little tool, and I hope I never see you in this court again. Now, is that pervasive bias?

MR. HUNGAR: Obviously, Mr. Chief Justice, it's difficult to draw precise lines in this area. That might well rise to the level of pervasive bias.

QUESTION: If that doesn't, what would?

(Laughter.)

MR. HUNGAR: The Fifth Circuit, for example, in a case cited in petitioner's reply brief, United States v.

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Holland, found pervasive bias where a defendant invited an error by the trial judge and then obtained reversal on that ground and the case was sent back to the same judge.

The judge then stated on the record that the defendant had betrayed the judge, had broken faith with the judge, and that as a consequence the judge was going to increase his sentence to punish him for doing this and to make sure he didn't waste the Government's money with a future trial, and the court of appeals found that that was pervasive bias, despite the fact that it was judicial and that it didn't involve anything --

QUESTION: Do you define pervasive bias as what a reasonable person would ascertain as being biased?

MR. HUNGAR: I think that the -- yes, Justice Kennedy.

QUESTION: I'm not quite sure why your exception doesn't mean that the whole exercise of judicial and extrajudicial sources is just irrelevant.

MR. HUNGAR: It's not irrelevant, Justice Kennedy, because in the vast majority of cases, what -- the way these cases are actually litigated is that parties tend to dislike rulings by judges, and then they may be able to point to a few stray comments by a judge that imitate -- that indicate some irritation, and putting those unfavorable rulings and the few stray comments

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together, they try and claim that recusal is required, and --

QUESTION: But if you have to go through the exercise of reviewing to see whether there's persuasive bias, why don't we just say that this is insufficient as a showing to disqualify, and the whole dichotomy between judicial and extrajudicial just becomes irrelevant at that point?

I mean, your brief is very candid, in which you say that there this exception when you think it's necessary, but I'm just wondering if the exception doesn't really swallow the rationale for having the distinction to begin with.

MR. HUNGAR: The courts of appeals, Your Honor, have had no difficulty separating the wheat from the chaff in this area.

The vast majority of cases that come up in the courts of appeals can be either dispensed with readily simply by applying the extrajudicial source requirement even if there's no allegation of pervasive bias at all, or it's so clear from the facts that it doesn't rise to that level that they need not conduct the kind of fact-intensive scrutiny of the transcript and the rulings in this trial and in previous trials the petitioners would have the courts conduct in every case.

QUESTION: Well, it is a little hard to real all that into the language of 455(a), isn't it?

MR. HUNGAR: The requirement -- I believe that that's correct, Justice O'Connor, it is difficult to read into the language of 455(a) the rather awkward and time-consuming procedures that petitioners are suggesting are there, and what's more --

QUESTION: Well, I think it's hard to read into it a pervasiveness requirement. I mean, the language just speaks of reasonable appearances.

MR. HUNGAR: With respect, Justice O'Connor, I think not, because, of course, the language "reasonableness" necessarily implies some flexibility and Congress obviously intended the courts to have some flexibility in applying that statute.

What I think the extrajudicial source requirement, as it has existed over the past 80 years, reflects, is the common sense notion and determination by this Court and the lower Federal courts that in general it's not reasonable to question -- to infer disqualifying bias based on the fact that a judge has developed points of view about a matter based on what the judge has learned in the course of conducting judicial proceedings.

Now, there may be --

QUESTION: So then we're just saying that that's

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not bias.

MR. HUNGAR: Exactly. That's correct. It's not partiality for a judge to develop points of view about the matter based on what the judge has learned in conducting judicial proceedings absent unusual circumstances, so a reasonable person --

QUESTION: But then, I don't think pervasive is quite the right word for the kind of bias you accept. I wonder if it isn't personal, as opposed to kind of philosophical, as your example from the Fifth Circuit would indicate. The trial judge was not opposed to any particular class of litigants. He just didn't like what this particular litigant had done.

MR. HUNGAR: That's correct, Your Honor, and the word "pervasive" may not be the most accurate name for that exception, but that's the name that the courts of appeals have adopted, and that's an important point, because what Congress did in enacting section 455(a) is leave to the courts a certain degree of discretion in defining the types of judicial conduct that should lead to recusal.

We believe that in so doing Congress did not -- certainly did not expressly indicate and did not implicitly indicate any intention to overturn the traditional rules that have governed recusal for bias in

this area, and one of those traditional rules that have governed recusal for bias in this area, and one of those traditional rules, of course, is the extrajudicial source requirement which has existed in the Federal courts for as long as there has been such a thing as recusal for bias.

Recusal for bias was not recognized at common law, and it was not available in the Federal courts until 1911, when Congress enacted the predecessor to 28 U.S.C. section 144.

QUESTION: Is your position essentially that the statute is silent, but there is -- there was a background jurisprudence, and Congress is taken to have allowed that -- to either have incorporated it or allowed it to stay undisturbed, so you don't get it out of the statute, except that the statute doesn't overturn what has been the doctrine?

MR. HUNGAR: That's exactly right, Justice Ginsburg. The statute is not inconsistent with the doctrine. The doctrine has been the backdrop against which the Federal courts have analyzed claims of recusal for bias for as long as there has been such a thing as recusal for bias, and Congress never evidenced any intention to eliminate that requirement either in the text of the statute, which is not inconsistent with the extrajudicial source requirement, or in the legislative

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history, which to the extent it addresses the extrajudicial source requirement at all, suggests that that requirement was not expected to be eliminated.

QUESTION: Well, with the exception of the fact that (b)(1) refers to personal bias and (a) does not.

MR. HUNGAR: It wouldn't have made any sense for Congress to refer to personal bias in 455(a). 455(a) was aimed primarily at an entirely different issue. Not at recusal for bias at all, but at --

QUESTION: Well, doesn't that assume the question before us? You're saying it was aimed at only one issue, and there is a textual argument to the effect -- by omitting any reference to personal there's a textual argument that it was aimed at two.

MR. HUNGAR: With respect, Justice Souter, even assuming -- and I think it is correct that section 455(a) can, of course, give rise to grounds for recusal for bias, but it wouldn't have made sense for Congress in an all-encompassing provision that is aimed not merely at recusal for bias but at recusal for interest, recusal for relationship, and indeed, from everything we can tell from the legislative history, was adopted specifically with reference to the law of recusal for interest, and not with respect to the law of recusal for bias.

So it wouldn't have made any sense for Congress

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to include a reference to personal bias in a statute that wasn't aimed exclusively at bias, and indeed was aimed primarily at interest and relationship, which has nothing to do with personal bias.

Congress adopted a general standard in section 455(a). The legislative history makes clear that the reason Congress adopted that standard, what it hoped to accomplish by doing so, was to change the law of recusal for interest as it had developed under the previous version of section 455.

Prior to 1974, section 455 addressed only recusal for interest and relationship. It had nothing to do with recusal for bias, and Congress when it amended the statute in 1974 made clear that the purpose of that amendment with respect to section 455(a) was to change two aspects of the law of recusal for interest as it had developed under section 455, namely this.

QUESTION: Well, if that's all it had wanted to do, wouldn't it have been easier to amend 144, because 144 does have a textual basis for the gloss that was put on it, because it refers to personal bias or prejudice, which is a textual basis for the extrajudicial source rule?

MR. HUNGAR: This Court has never based -- despite what the petitioner claims about this Court's decision in the Grinnell Corporation case, this Court has

never identified the word "personal" in section 144 as the basis for the extrajudicial source doctrine.

I think, fairly read, this Court's decisions simply reflect, as I said, the common sense notion that it's generally not reasonable to question a judge's impartiality if the judge is forming opinions based on what the judge hears in the case. That's what judges are supposed to do. That's what they do every day, and that's what a reasonable observer would expect them to do.

But if a judge is forming opinions about the parties or the case based on something totally extraneous to the case, something that the judge has read in the newspaper or been told at the country club, then I think a reasonable person would tend to question the judge's impartiality.

QUESTION: Well, once again, you're not saying that if the judge forms his opinion based on what's in the case there's absolutely no basis. You're just saying, unless that opinion is so strong that it amounts to pervasive bias --

MR. HUNGAR: That's correct, Your Honor, because that's how this doctrine that has existed for 80 years has been applied by the courts of appeals, and that's consistent --

QUESTION: Can you give me a definition of

pervasive bias, because I really -- I agree with Justice Kennedy, I don't see what's gained by adopting this rule with this exception.

MR. HUNGAR: I'm not sure. It has to be -- it has been fleshed out by the courts of appeals on a case-by-case basis, and obviously it would --

QUESTION: Does it mean anything different than really bad bias? Is that what it means?

(Laughter.)

MR. HUNGAR: That might be as good a way of putting it as any, Justice Scalia.

QUESTION: It may be better than pervasive, because pervasive to me means more than the single comment. You acknowledged to the Chief Justice that one comment at the end -- you know, you are a, whatever it was he said --

MR. HUNGAR: That's correct.

QUESTION: I notice in your brief there was some discomfort that you had with pervasive bias that you get out of a Fifth Circuit decision which you credit for it. You put that in a footnote. Your own term is, "except in extreme cases," so maybe instead of trying to define pervasive bias, the term you've used as a synonym is "extreme cases," so could you give us an extreme case?

MR. HUNGAR: Well, I think the case I mentioned,

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the Fifth Circuit case by definition, since that's --

QUESTION: You would have preferred that they characterized it as an extreme case, instead of saying pervasive bias existed.

MR. HUNGAR: Well, it doesn't really matter, Justice Ginsburg, how it's characterized. I think the point is that this doctrine as it has existed for as long as there has been recusal for bias allows for an exception in egregious cases, pervasive bias cases, whatever you want to call them, and that that approach is not inconsistent with the language of section 455(a), so we cannot infer from the language of section 455(a) any congressional intention to dispense with --

QUESTION: Well, you might have an extreme case that is not one where the bias has been -- pervasive has the idea throughout, and you could have an extreme case based on one remark.

MR. HUNGAR: Yes, we agree with that, Justice Ginsburg, and that --

QUESTION: If it was a racial epithet, for example.

MR. HUNGAR: Precisely, and the Justice -- and the courts of appeals have not construed the pervasive bias exception to require multiple incidents throughout. If one statement is sufficiently evidence of bias, then it

is disqualified.

QUESTION: Mr. Thompson says that this is an extreme case. I mean, he said that before. He said, gee, you know, I've been practicing for how many years, and I've never brought a disqualification motion before.

MR. HUNGAR: Well --

QUESTION: Where does it get you to say it has to be an extreme case? He says this is an extreme case.

MR. HUNGAR: Well, in this case, Justice Scalia, it gets us the judgment, because they never raised the pervasive bias argument, either in the district court, in the court of appeals, or in this Court. The only question before the Court is whether --

QUESTION: They had to say -- he didn't say this is an extreme case below, either? He didn't say --

MR. HUNGAR: This case has been litigated from the beginning on the ground that petitioners lose if the extrajudicial source requirement survived enactment of section 455(a).

QUESTION: But it's not as if the pervasive bias exception were set forth in the statute as a kind of affirmative defense. I mean, it's all part of the interpretation of 455(a), isn't it?

MR. HUNGAR: Yes, and part of the interpretation of this doctrine as it has existed.

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This case is not about pervasive bias, both because the petitioners haven't alleged it and because I think any fair reading of the claims they asserted in their brief, without getting any further into the transcript and the merits of the judge's ruling, plainly indicates that the judge is not so biased against the defendants that recusal is plainly required, but more to the point, section 455(a) and the language of that statute, as we've indicated, is not inconsistent with the extrajudicial source requirement, including the pervasive bias exception.

Whether, as a matter of first impression, this Court would have adopted precisely the same approach to recusal for bias if faced with the language of section 455(a) and nothing else, is beside the point. The point is that because the doctrine, which has existed from the beginning of this entire area of the law, is not inconsistent with the language of section 455(a), the conclusion is inescapable that Congress did not indicate any intention to eliminate that doctrine when it enacted section 455(a).

And the legislative history likewise not only doesn't indicate any intention to eliminate that doctrine, but to the extent it addresses that issue at all, suggests that Congress was led to believe that the doctrine would

continue to exist.

This Court said, in the Midlantic National Bank case, that if Congress intends to eliminate -- excuse me. If Congress intends to change the interpretation of a judicially created concept, it makes that intent specific. For that reason, petitioners, not the Government, bear the burden of demonstrating that Congress intended to change the law, intended to eliminate the judicially created extrajudicial source doctrine --

QUESTION: I'm a little puzzled by this, because the -- as I understand your argument, the pervasive bias exception is something that developed 80 years ago, so it's an exception to a rule that was superseded by 455(a). I don't know quite how you can assume that if the rule itself has been changed, that some exception to a different rule would necessarily survive under the statute.

MR. HUNGAR: Well, that assumes the conclusion, Justice Stevens. We submit that --

QUESTION: 455(a) is a new rule.

MR. HUNGAR: Not with respect to recusal for bias. That's what this case is about, Justice Stevens.

QUESTION: Well, it's a recusal for appearance of -- where it's partiality might reasonably be questioned. Isn't that an appearance of bias situation?

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MR. HUNGAR: Well, section 144 also addressed the appearance of bias. Contrary to what petitioners say, it was not -- section 144 did not have and does not have a subjective test. It's not up to the judge to decide whether in fact he or she is biased. The question is whether the parties have alleged, (a) that the judge is biased, and (b) have alleged facts that, if true --

QUESTION: But you in your opposition say that the judge didn't abuse his discretion in finding he was not biased. You said, it's not up to the judge, but your brief argues that he didn't abuse his discretion.

MR. HUNGAR: It's up to the judge to decide the motion, Your Honor. The question, though, under both section 144 and 455(a) is whether the facts are such as to create, in the language of section 455(a) to cause a reasonable person to question the judge's impartiality, or under 144 and the language of this Court, whether they are such as to fairly support the charge that the judge might be partial. It doesn't require a finding that the judge actually is biased.

So in both -- under both statutes, there's an appearance rather than an actuality focus to the statute, so we think that's one reason why section 455(a) is entirely consistent with the approach followed by this Court and the lower courts under section 144, and why

section 455(a) can't be construed to eliminate or to overturn that approach.

QUESTION: In all candor, I haven't read the pervasive bias exception cases. Are there more than one after the 455(a) was adopted?

MR. HUNGAR: I believe so, Your Honor. The Holland case --

QUESTION: Is there sort of a leading case you can point to on the pervasive bias exception as applied to 455(a)?

MR. HUNGAR: Not that I'm aware of, Your Honor. The Holland case is the only one that comes to mind. Certainly the cases we've cited in our brief all recognize the pervasive bias exception. I'm not sure whether they find it in those cases or not.

But this case -- the central focus of our submission is not on the pervasive bias exception at al. It doesn't -- even if there were no such thing as the pervasive bias exception, our argument would be the same, because the extrajudicial source requirement, which is what disposes of 99 percent of the cases that come up in this area, is something that has existed for as long as recusal for bias has existed.

Congress didn't evidence any intention that it wanted to change that aspect of the law of recusal -- that

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is, the extrajudicial source requirement and the law of recusal for bias. What Congress indicated when it enacted section 455 in 1974 was that it wanted to change the law of recusal for interest, because the law of recusal for interest was unsatisfactory if you had a subjective test, and Congress didn't want to have a subjective test.

QUESTION: Are you -- let me -- I just want to be sure I understand your position. Would it have been correct procedure for the court of appeals in this case to have looked at the papers and said, everything he alleges is something that happened in either this case or the 1983 case. We don't have to look at that. We'll just affirm. Would that have been a sufficient discharge of the judicial duties of the circuit judges?

MR. HUNGAR: If the court of appeals said that there's no indication that anything the judge did in this case or the early case --

QUESTION: No, no --

MR. HUNGAR: -- had an extrajudicial source.

QUESTION: That's not my question. My question is, we don't even have to read it on the basis of the submission here, because it's all in the proceeding, and there's no allegation of pervasive bias.

MR. HUNGAR: No. The extrajudicial source requirement has never been applied so as to permit

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reference to things that happen in the course of judicial proceedings.

If a judge, in the course of judicial proceedings, says, I'm going to rule against you because you are Hispanic and I don't like Hispanics, that is extrajudicial bias. The judge has an invidious discriminatory animus towards Hispanics, and that is not a proper basis on which to rule, and the judge should be disqualified, so you have to look at that -- depending on the allegations, you might have to look --

QUESTION: What if the judge says to somebody, say a man during a divorce trial, that after hearing what you did in this case, I'm simply appalled, and I can't believe any human being would do that. Now, is that -- the guy comes up in another trial and says, you're biased against me. Is that extrajudicial source, or not?

MR. HUNGAR: No, it's not, Your Honor, because the judge based that opinion, based on what the judge saw in the course of the trial, on the facts and the --

QUESTION: Well, I don't think it makes good sense, then. Maybe that doesn't mean it shouldn't be the law.

QUESTION: What we're really talking about here --

(Laughter.)

QUESTION: What we're really talking about here is philosophical bias, and that we don't want a judge disqualified for philosophical bias, and usually that will come up -- the judge's philosophical approach will come up as a result of rulings during the trial.

But something could come up during the trial, simply poisons the judge's mind in a way that has nothing to do with this philosophical approach, and it seems to me perhaps that is a better example than the kind of other examples of pervasive bias.

MR. HUNGAR: Well, certainly, Your Honor, the law as it existed under section 144 and the extrajudicial source requirement, and as we claim should continue to exist, provides that a judge's philosophical views of the law are not a proper basis for recusal. We, at least, agree with that.

QUESTION: Mr. Hungar, I guess I really don't understand just what's -- did you say that if the judge says that in the course of the trial, I'm going to rule against you because you're Hispanic, that does not come within the extrajudicial source?

MR. HUNGAR: It would be an extrajudicial source.

QUESTION: It would be an extrajudicial source --

MR. HUNGAR: Yes, because --

QUESTION: -- even though the statement is made during the trial?

MR. HUNGAR: The question is not where the --

QUESTION: It's the source of the bias, not the source of the statement that counts?

MR. HUNGAR: Precisely. Precisely, Your Honor. That's correct, because as we have suggested, this -- and the logic of the Court's ruling in this area over the past 80 years is consistent with this. It's simply not reasonable to --

QUESTION: But he only discovered the man was Hispanic at the trial. I mean --

MR. HUNGAR: Well, that's right, Your Honor, but --

QUESTION: -- he never knew this man before.

MR. HUNGAR: I think we presume that there is some extrajudicial source for that basis, and the courts of appeals have so said. Justice Kennedy in the United States v. --

QUESTION: Mr. Hungar, the cases speak in terms of in-court conduct. In-court conduct is what's --

MR. HUNGAR: That's correct, Justice Ginsburg, but if the in-court conduct -- if the judge evidences an extrajudicial bias, that is, the reason the judge is doing

something in court is because the judge is biased against a particular class, a particular race of defendants, or what have you, the courts of appeals have uniformly said that that is extrajudicial.

Justice Kennedy in the United States v. Conforte case for the Ninth Circuit --

QUESTION: Yes, but what if the judge said, I've tried 100 narcotics cases involving Hispanic defendants, and they're all liars, I'm convinced of that, and I therefore conclude I don't like Hispanics. The source of his bias arose in a series of cases. Do you disqualify him, or not?

MR. HUNGAR: The courts of appeals have applied the -- have found that alleged bias is judicial if it's based on what the judge learned about a defendant in the course of conducting trials involving --

QUESTION: He thinks he learned about a characteristic of a class of persons from trying a lot of cases involving members of the class.

MR. HUNGAR: There's no question, Your Honor, that if the judge displays in invidious racial or religious --

QUESTION: Even if the source of it is judicial --

MR. HUNGAR: Well, yes, although that --

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QUESTION: -- in the judicial proceeding, and that's the only time he ever met a Hispanic, was in the courtroom.

MR. HUNGAR: That's correct, Justice Stevens. That question, of course, has never arisen, and I think is very unlikely to arise, but if it did arise, I think the courts of appeals would say, because they have been so concerned to ferret out class-based animus of that nature, I think they would, and quite properly, require that the judge be recused.

But again, this a doctrine, a judicial --

QUESTION: But it seems to me the inquiry is to the nature and the intensity of the bias, and not its source.

MR. HUNGAR: The source is directly relevant to that inquiry, Justice Kennedy. If a judge says to a defendant, I find you are not credible because my sister told me so, we are much more concerned than if the judge says to a defendant, I find, based on the way you've testified and your appearance and the kinds of things you say in the course of the trial, that you are not credible, that --

QUESTION: That's not a fair hypothetical, because in one case we know that the bias was proper, and in the other case we know that there's no bias at all.

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MR. HUNGAR: That's exactly right, Justice Kennedy. It's not bias in the second case because the judge is acting based on what the judge is supposed to act --

QUESTION: But so then you've just given us a hypothetical in which it's self-answering, because there's no bias at all in the second hypothetical under any theory.

MR. HUNGAR: That's our submission, Justice Kennedy, that there is no bias within the meaning of section 455, and the doctrine of recusal for bias as a general rule, at least, if a judge forms opinions about the parties based on what the judge has learned in the case.

QUESTION: Of course, you'd also say there's no bias if what the judge said is, I've seen your right eye twitching during this whole trial, and I conclude from that that you are just an incorrigible liar. That would not be bias either, right, because that's --

MR. HUNGAR: Well, again --

QUESTION: That's a judicial source. He derived that from, you know -- this judge just jumps to quick conclusions on the basis of minor evidence.

MR. HUNGAR: Well, it might be grounds for reversal, Your Honor. It might be grounds for a finding

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of pervasive bias. It's not clear how the courts of appeals would respond to that type of hypothetical. Obviously, at the margin there are always going to be difficult cases, but in reality --

QUESTION: That is not an extrajudicial source. You would acknowledge that that's a judicial source.

MR. HUNGAR: I wouldn't acknowledge that. I'm not sure, Your Honor. It depends on the facts. If the judge -- I mean, it's a --

QUESTION: Wait -- now wait.

MR. HUNGAR: -- fairly ridiculous hypothetical, but --

QUESTION: If he says, on the basis of what you said, I conclude you're an incorrigible liar. You say, well, that's a judicial source, but if he says, on the basis of my watching your eye twitch you're an incorrigible liar, it suddenly becomes an extrajudicial source?

MR. HUNGAR: No. I think if that's the only thing he says it's probably judicial. It depends, though. If the judge says something suggesting a class-based animus towards eye-twitchers, I don't know. That might --

QUESTION: Could he have read a book out of court about eye-twitchers?

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MR. HUNGAR: That might constitute an extrajudicial source.

QUESTION: Is there an easy way to get where we all seem to be agreeing we should end up, simply to say that subsection (a) does not contain the limitation that you say it contains, and construe it simply to require a very serious, a very bad degree of bias before it comes into play?

Your way of getting to the point where everybody seems to say we should get is to say that there is an extratextual exception to a requirement which is itself not textual in subsection (a). Why isn't it easier to say that yes, subsection (a) can by its terms include the judicially derived bias, but it's got to be very serious?

MR. HUNGAR: It may or may not be easier, Justice Souter, but it would not be consistent with this Court's cases defining the appropriate approach to statutory construction.

I think what I hear members of the Court saying is that the extrajudicial source requirement as we define it is consistent with the language of section 455, but that it might be equally appropriate to define -- to interpret the language of section 455(a) to adopt a rule that's phrased differently but the results are the same.

That being the case, the extrajudicial source

requirement is consistent with the language of the statute, so Congress cannot be deemed to have eliminated that requirement.

Thank you.

QUESTION: Thank you, Mr. Hungar. Mr. Thompson, you have 7 minutes remaining.

REBUTTAL ARGUMENT OF PETER J. THOMPSON

ON BEHALF OF THE PETITIONERS

MR. THOMPSON: Thank you, Your Honor. May it please the Court:

There is no pervasive bias exception to 455(a). The pervasive bias exception only comes up when the circuit courts of appeal have used their inherent authority to remove a judge.

The perfect example of this is, 1) if you look at the language that has just been used, the language in the statute is "might," that is, whether there's an appearance of bias. The language in the statute is not "pervasive" or "really bad" or "extreme," so that so-called pervasive bias exception couldn't have anything to do with 455(a).

As further proof of the --

QUESTION: It's not just "might." It says, "might reasonably."

MR. THOMPSON: "Might reasonably," but --

QUESTION: And that's where they say the pervasive comes from -- "might reasonably" -- and unless it's a pervasive bias, they say, it would not reasonably.

MR. THOMPSON: But if it's only "might," Your Honor, what it would -- what "might" means is an appearance of bias, not a pervasive bias, so the standards are totally different. 455(a) doesn't even require bias, it requires an appearance of bias, and if you have pervasive bias, it's beyond bias. I mean, it's an extremely egregious situation.

QUESTION: Oh, I think what they're saying is, look, when you've just sat through 3 days of trial in an odious torture and homicide case, one would expect you to come out of it with a fairly -- assuming the person's convicted, with a fairly poor opinion of this person, and that has to -- and that would be expected to be shown in the judge's comments at sentencing and perhaps during trial, but that's okay.

MR. THOMPSON: I agree.

QUESTION: That is not -- that is not unreasonable, but it's only when it becomes unreasonable. I mean, he flies into a towering rage, or something. Then, at that point, it doesn't come within 455(a). Why isn't that a perfectly valid interpretation of the language?

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MR. THOMPSON: It's not a valid interpretation of the language, and you can see it in the Jacobs case in the Ninth Circuit.

In that case, the judge was supposedly guilty of pervasive bias. They dismissed an indictment against the Government and did some other things. It went up to the Ninth Circuit. The Ninth Circuit candidly admitted, if this case were here under 455(a), we couldn't remove the judge because of our extrajudicial source requirement.

The judge did all of this in the courtroom, just as the hypotheticals we've been talking about this morning. Therefore, since 455(a) wouldn't require removal, we can do it, however, under our inherent authority of the court, and that's where pervasive bias comes in.

It doesn't have anything to do with 455(a). It comes in out of Offutt and the other cases from this Court and from the circuit courts of appeal, where they have said, if things get so out of control, we can remove a judge, just as Judge Elliott was removed a few months ago by the Eleventh Circuit.

They don't have the 455(a) determination about in-court conduct, and they removed him for harsh language back toward the Eleventh Circuit in Clark v. Coats & Clark. They are two totally separate things, and there's

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no pervasive bias exception.

QUESTION: That was on direct appeal?

MR. THOMPSON: That was on direct -- that was on a third appeal.

QUESTION: Harsh language toward the judges of the Eleventh Circuit?

(Laughter.)

MR. THOMPSON: The second -- Mr. Hungar says it's only common sense, this argument he makes about what is in court and what is out of court, and how we should judge judges.

It seems to me what common sense is is the extrajudicial source requirement makes no sense, because the way we know our judges is in the courtroom and by their judging, not by their off-bench conduct, so what makes common sense is to apply the statute the way it is written.

Thirdly, he said in 1974 there has been no change in the law, and therefore, since we want to drop the extrajudicial source requirement under 455(a), we have the burden. 455(a), may it please the Court, was an entirely new proposition in 1974. Before that 455(a) only talked about conflicts of interest.

455(b) expanded that, and then 455(a) was a completely new proposition of law, which set up for the

first time appearance of bias as the proper standard.

QUESTION: Counsel, does that apply to this Court as well, the members of this Court?

MR. THOMPSON: It does. It does, because it says "any justice, judge, or magistrate."

Next, there was a question -- I think it was by Justice O'Connor. The Eleventh Circuit, based on their decision, and Judge Elliott based on his decision, never read the transcript and never had to look at 1983.

That's what's fundamentally unfair about the extrajudicial source requirement, because the confidence in the judiciary is going to be diminished if someone makes allegations, whether they're right or wrong, about what happened in '83 and the judges say, we are going to hide behind extrajudicial source requirement, we are going to dodge the allegations, and we don't have to read the transcript. That --

QUESTION: Wouldn't they have to read the transcript as long as the doctrine comes with the exception for extreme cases, read the transcript to see if this is an extreme case?

MR. THOMPSON: Given the pervasive bias argument he made, only the '91 transcript, Your Honor, because the '83 conviction wasn't on appeal.

Finally, I think --

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QUESTION: That comment --

MR. THOMPSON: Excuse me.

QUESTION: -- I don't understand at all, because I thought one of the reasons -- one of the ways you were establishing that this judge gave at least the appearance of bias was based on the encounters at the 1983 trial.

MR. THOMPSON: That's precisely correct, Your Honor, and no one has ever read that transcript.

Finally, I think Justice Kennedy's --

QUESTION: But they say -- I think they say that they would have read it if you had said this was really bad.

MR. THOMPSON: If it's --

(Laughter.)

QUESTION: I think that's the Government's position. They would have read it if -- you just didn't say it was really bad.

MR. THOMPSON: If I had said it was really bad --

QUESTION: Did you not say it was really bad?

MR. THOMPSON: I said verbally it was really bad, but 455(a) doesn't say that I should say it's really bad.

(Laughter.)

CHIEF JUSTICE REHNQUIST: Thank you,

Mr. Thompson. The case is submitted.

(Whereupon, at 11:57 a.m., the case in the above-entitled matter was submitted.)

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JOHN PATRICK and CHARLES JOSEPH LITEKY, and ROY LAWRENCE)

BOURGEOIS V. UNITED STATES

CASE 92-6921

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)